IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

VALERIA TANCO and SOPHY JESTY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 3:13-cv-01159**
	)	**Trauger/Griffin**
WILLIAM EDWARD "BILL" HASLAM, as Governor of the State of Tennessee, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants hereby submit their Response in Opposition to Plaintiffs' Motion for Preliminary Injunction.

INTRODUCTION

"By history and tradition the definition of marriage . . . has been treated as being within the authority and realm of the separate States." *United States v. Windsor*, 133 S.Ct. 2675, 2689-90 (2013); *see Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877), *overruled on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . . ."). To date, 16 States, including New York and California, have exercised this sovereign authority to permit same-sex marriage.[1] But 33 other States, including Tennessee, have exercised this

[1] Nat'l Conference of State Legislatures, "Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage," http://www.ncsl.org//research/human-services/same-sex-marriage-overview.aspx (last updated Nov. 21, 2013).

authority to prohibit same-sex marriage, defining marriage as the union of a man and a woman.[2]

Plaintiffs are same-sex couples who were lawfully married in the States of New York and California and have since moved to Tennessee. They now seek a preliminary injunction, insisting that the State of Tennessee must recognize their out-of-state marriages and that Tennessee's failure to do so violates the Federal Constitution. Plaintiffs' claims amount to the contention that in an area of law exclusively reserved to the separate States, and on an issue that "is currently a matter of great debate" and over which "people of good will may disagree, sometimes strongly,"[3] a minority of States may set national policy for the entire country. But they may not. In the midst of this ongoing debate over same-sex marriage, it is one thing to say that an individual State *should* recognize same-sex marriage; it is quite another thing, though, to say that an individual State *must* recognize same-sex marriage. Because Plaintiffs' constitutional claims will fail, and given the harm that results whenever a State is enjoined from enforcing its own duly enacted laws, the case is inappropriate for preliminary injunctive relief.

TENNESSEE'S MARRIAGE LAWS

Tennessee statutes regulating marriage are set forth in Chapter 3 of Title 36 of the Tennessee Code. *See generally* Tenn. Code Ann. §§ 36-3-101 to -505. Plaintiffs' claims concern two separate Tennessee laws defining marriage. The first, Tenn. Code Ann. § 36-3-113, enacted in 1996, states:

> (a) Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the

[2] *Id.*

[3] *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012), *vacated and remanded, Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).

> relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.
>
> (b) The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state.
>
> (c) Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee.
>
> (d) If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state.

In 2006, Tennessee voters enacted an amendment to the Tennessee Constitution also defining marriage:

> The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

Tenn. Const. art. XI, § 18. These two laws will be collectively referred to here as "Tennessee's Marriage Laws."

ARGUMENT

Plaintiffs request that the Court issue a preliminary injunction prohibiting the State from enforcing Tennessee's Marriage Laws. When evaluating a request for preliminary injunction, a court must evaluate four factors:

> (1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 347 (6th Cir. 1998) (quoting *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997)); *see McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012); *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1030 (6th Cir. 1995). These four considerations are "factors to be balanced and not prerequisites that must be satisfied." *McNeilly*, 684 F.3d at 615 (quoting *Am. Imaging Servs., Inc. v. Eagle–Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir.1992)). Because a preliminary injunction is an extraordinary remedy, "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *McNeilly*, 684 F.3d at 615 (quoting *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)). The moving party bears the burden of justifying such extraordinary relief, "including showing irreparable harm and likelihood of success." *McNeilly*, 684 F.3d at 615 (citing *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974)).

Plaintiffs cannot meet this burden and thus are not entitled to injunctive relief.

I. PLAINTIFFS CANNOT SHOW A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

The first factor for injunctive relief requires that the Court evaluate the merits of the movant's legal claims. Plaintiffs argue that their 42 U.S.C. § 1983 action, asserting violations of their rights to due process, equal protection, and travel, has a strong likelihood of success. These claims, however, are doomed to fail. They are based upon an overly broad reading of the Supreme Court's recent decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013); they are also based on the flawed premise that in the context of recognizing out-of-state marriages, Tennessee law singles out same-sex marriage for different treatment.

A. Tennessee's Marriage Laws Do Not Violate Due Process.

Plaintiffs assert that "the Anti-Recognition Laws violate due process because they impermissibly deprive Plaintiffs of a protected liberty interest in their existing marriages." (Doc. No. 30, at 11). The Due Process Clause of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. Defendants agree that this clause "guarantees more than fair process," *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); it also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests"—but only "those fundamental rights and liberties which are objectively, 'deeply rooted in this Nation's history and tradition. . . and implicit in the concept of ordered liberty,' such that neither liberty nor justice would exist if they were sacrificed." *Id.* at 720-21 (citations omitted). "Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking'. . . that direct and restrain our exposition of the Due Process Clause." *Id.* at 721 (citations omitted). And the Supreme Court has been reluctant to expand this concept of substantive due process:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field," lest the liberty protected by the Due Process clause be subtly transformed into the policy preferences of the Members of this Court.

Glucksberg, 521 U.S. at 720 (citations omitted). *See Does II & III v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007) ("identifying a new fundamental right subject to the protections of substantive due process is often an 'uphill battle,' . . . as the list of fundamental rights 'is short.'").

Plaintiffs expressly disavow, for purposes of their motion for preliminary injunctive relief, reliance on any fundamental right to same-sex marriage,[4] and with good reason: There *is no* fundamental right to same-sex marriage, as discussed below. *See Baker v. Nelson*, 409 U.S. 810 (1972) (rejecting, by dismissal of appeal for lack of a federal question, claim that there exists a fundamental constitutional right to same-sex marriage).[5] Plaintiffs instead assert, relying on the decision in *United States v. Windsor*, that they have a protected liberty interest in their *existing marital relationships* and that Tennessee's Marriage Laws deprive them of that interest. But Plaintiffs' reliance on *Windsor* is misplaced.

In *Windsor*, the Supreme Court held invalid Section 3 of the *federal* Defense of Marriage Act (DOMA), not because the recognition of same-sex marriages is required by the Federal Constitution but because the *federal* government lacks authority to discriminate between opposite-sex and same-sex marriages when both are recognized under a particular state's law. *See id.* at 2694 ("By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purposes of state law but unmarried for the purpose of federal law."); *see also id.* at 2692 ("What the State of New York treats as alike the federal law deems unlike. . . ."). But the situation is far different where, as here, one State's laws allow same-sex marriage and another State's laws do not. *See id.* at 2692 ("DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for

[4] See Doc. No. 30, at 17 n.6 ("This motion does not require the Court to decide whether state laws barring same-sex couples from marrying infringe upon Plaintiffs' fundamental rights to marry the person of their choice. . . . Although Plaintiffs contend that the Constitution does require that states grant same-sex couples the freedom to marry, . . . the Court need not reach that issue to grant the preliminary relief requested in this motion.").

[5] Recent federal district court decisions addressing constitutional challenges to state marriage laws have concluded that *Baker* remains binding. *See Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1086-87 (D. Haw. 2012); *Sevcik v. Sandoval*, 911 F.Supp.2d 996, 1002-03 (D. Nev. 2012); *see also Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2206); *Walker v. Mississippi*, No. 3:04-cv-140 LS, 2006 U.S. Dist. LEXIS 98320, at *4 (S.D. Miss. July 25, 2006); *Wilson v. Ake*, 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005).

all married couples within each State, though *they may vary, subject to constitutional guarantees from one State to the next.*") (emphasis added).[6]

As the Court observed in *Windsor*, the "regulation of domestic relations is an area that has been regarded as a virtually exclusive province of the States," and "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* at 2691. Indeed, the State's exclusive authority to define the marital relation was "of central relevance" in *Windsor*, *id.* at 2692; *see also id.* at 2693 ("The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people."); it was the *federal* government's "depart[ure] from this history and tradition of reliance on state law to define marriage" that gave rise to the deprivation that the Court held to be unconstitutional. *Id.* at 2692.

The States of New York and California have decided to allow same-sex marriages, and "[t]hese actions were without doubt a proper exercise of [their] sovereign authority within our federal system." *Windsor*, 133 S.Ct. at 2692. But Tennessee's decision *not* to recognize same-sex marriages was just as proper an exercise of its own sovereign authority to regulate domestic relations and to define marriage. *See Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2623 (2013) ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States.") (quoting *Northwest Austin Municipal Util. Dist. No. One*

[6] Section 2 of DOMA, which was not at issue in *Windsor*, expressly allows States to decline to recognize same-sex marriages performed under the laws of other States. *See* 28 U.S.C. § 1738C; *see also Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005) (holding that Section 2 of DOMA did not violate the Full Faith and Credit Clause, was an appropriate exercise of Congress' power to regulate conflicts between the laws of different States because ruling otherwise could create license for a single State to create national policy, and did not violate due-process or equal-protection principles).

v. Holder, 557 U.S. 193, 203 (2009)) (emphasis in original). Whatever protected interest Plaintiffs may have in their existing marriages exists solely by virtue of the laws of New York and California and is limited to those States.[7] Tennessee's Marriage Laws do not "creat[e] two contradictory marriage regimes *within the same State*," *id.*, 133 S.Ct. at 2694 (emphasis added), and thus do not violate due process.

B. Tennessee's Marriage Laws Do Not Deny Equal Protection.

The Equal Protection Clause of the United States Constitution "prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *Rondigo, L.L.C., v. Twp. of Richmond*, 641 F.3d 673, 681-82 (6th Cir. 2011). Because Tennessee's Marriage Laws do none of these things, they do not deny equal protection.

1. Plaintiffs' Equal-Protection Claims Fail Because Tennessee's Marriage Laws Do Not Discriminate Against Plaintiffs.

The fundamental premise of Plaintiffs' equal-protection claim (indeed, of all their claims) is that "the Anti-Recognition Laws target same-sex couples, and only those couples, for denial of recognition of their otherwise valid out-of-state marriages." (Doc. No. 30, at 30; *see id.* at 11). But this assertion is simply incorrect. The plain language of Tennessee's Marriage Laws clearly states that Plaintiffs' marriages are but one of many types of marriages not recognized by the State. *See* Tenn. Code Ann. § 36-3-113(d) ("If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, *any such marriage* shall be void and unenforceable.") (emphasis added). Included in that group, to be sure, are same-sex marriages, but also included are other marriages that Tennessee law prohibits. *See*

[7] "The dynamics of state government in our federal system are to allow the formation of consensus respecting the way the members of a *discrete community* treat each other in their daily contact and constant interaction with each other." *Windsor*, 133 S.Ct. at 2692 (emphasis added).

Tenn. Code Ann. §§ 36-3-101 and -102. *See also* Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113(b) (recognizing only the union of *one* man and *one* woman as marriage).

In reality, Plaintiffs are not treated any differently by Tennessee's Marriage Laws than their peers in the similarly situated class of persons whose marriages are prohibited within Tennessee, so Plaintiffs' comparison to *all* opposite-sex couples married out of state is inapt. This renders futile their reliance on the preliminary-injunction order issued by the district court in *Obergefell v. Kasich*. No. 1:13-cv-501 (S.D. Ohio July 22, 2013). In *Obergefell*, the district court issued its ruling based upon its finding that "by treating lawful same sex marriages differently than it treats lawful opposite sex marriages (*e.g.* marriages of first cousins and marriages of minors), Ohio law, as applied to these Plaintiffs," violates the Equal Protection Clause. *Id.*, slip. op. at 1. Not so here; out-of-state same-sex marriages are not singled out for different treatment. Tennessee's Marriage Laws treat out-of-state same-sex marriages exactly the same as any other out-of-state marriage that is prohibited in Tennessee.

Plaintiffs posit that "Tennessee courts have, almost without exception, held that marriages validly entered into in other jurisdictions will be honored in Tennessee—even if the couple would not have satisfied the statutory requirements to obtain a license to marry in Tennessee." (Doc. No. 30, at 12-13). Plaintiffs rely upon *Shelby County v. Williams*, 510 S.W.2d 73, 74 (Tenn. 1974); *In re Estate of Glover*, 882 S.W.2d 789, 789-90 (Tenn. Ct. App. 1994); *Lightsey v. Lightsey*, 407 S.W.2d 684, 690 (Tenn. Ct. App. 1966); *Keith v. Pack*, 187 S.W.2d 618, 619 (Tenn. 1945); and *Farnham v. Farnham*, 323 S.W.3d 129 (Tenn. Ct. App. 2009), in support of this proposition. But all of these cases, except *Farnham*, were decided prior to the 1996 enactment of Tenn. Code Ann. § 36-3-113 and are therefore inapposite. And *Farnham* was decided without addressing § 36-3-113. It concerned a marriage entered into by a

husband and wife while the wife was awaiting a final divorce order regarding her previous marriage. *Farnham*, 323 S.W.3d at 131. Under Florida's laws, where the marriage license was obtained, and Massachusetts's laws, where the couple lived for two years, their technically bigamous marriage had been cured and was valid. *Id.* at 133-34. The Tennessee Court of Appeals held that the husband was estopped from using the initial invalidity of the marriage to his advantage during a divorce proceeding when the marriage's technical defects had been cured by the laws of Florida and Massachusetts and was no longer considered bigamous in those States. *Id.* at 136.

Accordingly, because Plaintiffs cannot demonstrate that they are suffering disparate treatment from the similarly situated class of persons with out-of-state marriages that are not recognized under Tennessee's Marriage Laws, their equal-protection claims must fail.

2. Plaintiffs' Equal-Protection Claims Fail In Any Event Because Sexual Orientation Is Not a Suspect Classification and Tennessee's Marriage Laws Satisfy the Rational-Basis Test.

Even if it were correct for Plaintiffs to compare themselves to opposite-sex couples with out-of-state marriages that *are* recognized in Tennessee, and even if the constitutionality of Tennessee's Marriage Laws ultimately depended upon the constitutional validity of Tennessee's definition of marriage as the union of one man and one woman, Plaintiffs' equal-protection claims would still fail. The decision of the United States Supreme Court in *Baker v. Nelson*, 409 U.S. 810 (1972), stands for the proposition that a state law limiting marriage to opposite-sex couples does not violate the Equal Protection Clause[8]; *Baker* is binding on this Court and compels the conclusion that Plaintiffs' equal-protection claims cannot succeed. *See, e.g.,*

[8] *Baker* so holds by virtue of the Supreme Court's dismissal, for want of a substantial federal question, of an appeal from the judgment of the Minnesota Supreme Court. Such a dismissal constitutes a disposition on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The Minnesota Supreme Court had held in *Baker* that: "The equal protection clause of the Fourteenth Amendment . . . is not offended by a state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Baker v. Nelson*, 191 N.W.2d 185, 187 (1971).

Jackson v. Abercrombie, 884 F.Supp.2d 1065, 1088 (D. Haw. 2012) ("*Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples and thus remains binding on this Court."). In the alternative, Plaintiffs' equal-protection claims fail because Tennessee's Marriage Laws do not burden a fundamental right, do not target a suspect class, and do not discriminate without a rational basis.

a. There Is No Fundamental Right to Same-Sex Marriage.

To qualify as a fundamental right, "such rights must be 'deeply rooted in this Nation's history and tradition,' or 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Does II & III v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007) (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), and *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Given the Supreme Court's reluctance to expand the list of fundamental rights, the Court has also "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Id.*

The concept of same-sex marriage is not "deeply rooted" in this Nation's history and tradition; same-sex marriage was unknown in the laws of this Nation before 2003. *See Windsor*, 133 S.Ct. at 2715 (Alito, J., dissenting) (stating that "[i]t is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition" and noting that no State permitted same-sex marriage until 2003). And while Plaintiffs have broadly asserted a "fundamental right to marry" (Doc. No. 1, at ¶ 123), Plaintiffs are actually claiming a narrower right: the right to marry someone of the same sex. *See Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1071 (D. Haw. 2012) ("Carefully describing the right at issue, as required by both the Supreme Court and the Ninth Circuit, the right Plaintiffs seek to exercise is the right to marry someone of the same sex.").

Supreme Court decisions recognize the right to enter into a legally recognized marriage only with a qualified person of the opposite sex. *See id.* at 1095 ("Significantly, the Supreme Court cases involving the fundamental right to marry all involved opposite-sex couples. Consequently, the Supreme Court, in discussing the fundamental right to marry, has had no reason to consider anything other than the traditional and ordinary understanding of marriage as a union between a man and a woman."); *see also Wilson v. Ake*, 354 F.Supp.2d 1298, 1306 (M.D. Fla. 2005) ("Although the Supreme Court has held that marriage is a fundamental right, *Glucksberg*, 521 U.S. at 720, 117 S.Ct. 2258, no federal court has recognized that this right includes the right to marry a person of the same sex."). Plaintiffs cannot escape the history and meaning of the right to marry, which has always been tied to the procreative purposes of marriage between a man and a woman. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (Marriage "is the foundation of the family and of society, without which there would be neither civilization nor progress"). Carefully described, Plaintiffs' asserted right is the novel and narrow right to marry a person of the same sex, which is not a fundamental right.

b. Sexual Orientation Is Not a Suspect Class.

Under Sixth Circuit precedent, it is well settled that sexual orientation "is not a suspect class in this circuit." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997); *see also Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir. 2012) (stating that "this court has not recognized sexual orientation as a suspect classification" and applying rational basis review); *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) (stating that "homosexuality is not a suspect class in this

circuit").[9] Although Plaintiffs make an argument for why this Court should not follow this Sixth Circuit precedent (Doc. No. 30, at 31-2), that argument is unavailing. The Supreme Court's decisions in *Windsor* and in *Lawrence v. Texas*, 539 U.S. 558 (2003), do not conflict with this precedent. *See Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1102 (D. Haw. 2012) (concluding that the Supreme Court's decision in *Lawrence* is not irreconcilable with the Ninth Circuit's holding that homosexuality is not a suspect class).

In what can only be seen as an attempt to secure the heightened scrutiny that gender-based discrimination demands, Plaintiffs claim that Tennessee's Marriage Laws discriminate on the basis of gender, in addition to their claims that the Marriage Laws discriminate on the basis of sexual orientation. But Plaintiffs cannot have it both ways. In any event, same-sex marriage bans do not discriminate on the basis of gender. *See Jackson*, 884 F.Supp.2d at 1098 ("an opposite-sex definition of marriage does not constitute gender discrimination"). Under Tennessee's Marriage Laws, "[m]en and women are treated identically . . . ; neither may marry a person of the same sex." *Andersen v. King County*, 138 P.3d 963, 988 (Wash. 2006). In other words, "[w]omen, as members of one class, are not being treated differently from men, as members of a different class." *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004). In fact, the Supreme Court has never found a sex-based classification where the law in question did not have a disparate impact on one sex or the other. *Smelt v. County of Orange*, 374 F.Supp.2d 861, 876-77 (C.D. Cal. 2006), *affirmed in part, vacated in part, and remanded by Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006).

[9] The Supreme Court has never recognized sexual orientation as a suspect classification for equal-protection purposes. And with the exception of the decision of the Second Circuit in *Windsor*, all other circuits that have addressed the issue have ruled likewise. *See Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 n.9 (10th Cir. 2008); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton v. Sec'y of Dep't of Children & Family Services*, 358 F.3d 804, 818 (11th Cir. 2004); *Veney v. Wyche*, 293 F.3d 726, 731 (4th Cir. 2002); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002); *Holmes v. Cal. Army Nat. Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997); *Steffan v. Perry*, 41 F.3d 677, 685 n.3 (D.C. Cir. 1994).

c. Tennessee's Marriage Laws Have a Rational Basis.

Because classes based upon sexual orientation are not suspect and same-sex marriage is not a fundamental right, Tennessee's Marriage Laws are subject merely to rational-basis review. *See Ledesma v. Block*, 825 F.2d 1046, 1051 (6th Cir. 1987). Under rational-basis review, a law is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal quotations omitted); *see also Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001) (stating that a statute is subject to a "strong presumption of validity" under rational-basis review and will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis.").

A court conducting a rational-basis review does not sit "as a super legislature to judge the wisdom or desirability of legislative policy determinations" but asks only whether there is some conceivable rational basis for the challenged statute. *Heller*, 509 U.S. at 319. Under rational basis review, it is "'constitutionally irrelevant [what] reasoning in fact underlays the legislative decision.'" *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*, 363 U.S. 603 (1960)). In enacting Tennessee's Marriage Laws, the General Assembly and the citizens of Tennessee had "absolutely no obligation to select the scheme" that a court might later conclude was best. *Nat'l R.R. Passenger Corp. v. A.T. & S.F.R. Co.*, 470 U.S. 451, 477 (1985). *See McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that in practice, their laws result in some inequality."). The presumption that a law is constitutional is even stronger with regard to laws passed by the citizens themselves at the ballot box, and the constitutional

provision that is part of Tennessee's Marriage Laws was passed by an overwhelming majority.[10] *See Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991) (applying rational-basis review and noting that the Court was "dealing not merely with government action, but with a state constitutional provision approved by the people of Missouri as a whole" and therefore the "constitutional provision reflects . . . the considered judgment . . . of the citizens of Missouri who voted for it.").

As stated above, "marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *see Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[Marriage] is the foundation of the family in our society."). Indeed, Tennessee's Marriage Laws expressly recognize the family "as the fundamental building block of our society." Tenn. Code Ann. § 36-3-113(a). A traditional purpose for the institution of marriage was to ensure that procreation would occur only within the confines of a stable family unit. *See* Noah Webster, *An American Dictionary of the English Language* 897 (1st ed. 1828) (marriage "was instituted . . . for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children"); *see also Windsor*, 133 S.Ct. at 2718 (Alito, J., dissenting) ("there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship"). And the promotion of family continuity and stability is certainly a legitimate state interest. *See Nordinger v. Hahn*, 505 U.S. 1, 17 (1992).

Obviously, though, "[s]ame-sex couples cannot naturally procreate." *Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1112 (D. Haw. 2012). Biology alone, therefore, provides a rational explanation for Tennessee's decision not to extend marriage to same-sex couples. *See*

[10] Article XI, § 18, of the Tennessee Constitution was enacted in 2006 upon the affirmative vote of approximately 80% of the voters. (Declaration of Mark Goins, Tennessee Coordinator of Elections, Exhibit A).

Citizens for Equal Protection v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006) (holding that state constitutional amendment recognizing marriage only between a man and a woman was rational "based on a 'responsible procreation' theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot"); *Donaldson v. State*, 292 P.3d. 364, 369 (Mont. 2012) (Rice, J., concurring) ("Beyond these reasons of family, societal stability, governance and progress, as important as they are, courts analyzing marriage have focused upon even more compelling reasons: its exclusive role in procreation and in insuring the survival, protection and thriving of the human race."); *see also Jackson*, 884 F.Supp.2d at 1113 n.36 (citing cases) ("Many courts have credited the responsible-procreation theory and held that there is a rational link between the capability of naturally conceiving children—unique to two people of opposite genders—and limiting marriage to opposite-sex couples."). Again, a court does not review a statute's wisdom or desirability, but considers only whether it has a rational basis. And there is nothing *irrational* about limiting the institution of marriage to the purpose for which it was created, by embracing its traditional definition. To conclude otherwise is to impose one's own view of what a State *ought* to do on the subject of same-sex marriage. *See Bruning*, 455 F.3d at 867-68 ("Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification 'lacks a rational relationship to legitimate state interest.'") (internal quotations omitted).[11]

The citizens of Tennessee amended their state constitution to include a particular and traditional definition of marriage. As the Eighth Circuit and other courts have held, "there is no

[11] Plaintiffs suggest that the *exclusion* of same-sex couples from the institution of marriage must itself further a legitimate state interest, but this is not the test. "[T]he State is not required to show that denying marriage to same-sex couples is necessary to promote the state's interest or that same-sex couples will suffer no harm by an opposite-sex definition of marriage." *Jackson*, 884 F.Supp.2d at 1106-07.

fundamental right to be free of the political barrier a validly enacted constitutional amendment erects." *Bruning*, 455 F.3d at 868. "The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of other purposes. The legislature—or the people through the initiative process—may rationally choose not to expand in wholesale fashion the groups entitled to those benefits." *Id*.

> Nationwide, citizens are engaged in a robust debate over this divisive social issue. If the traditional institution of marriage is to be restructured, as sought by Plaintiffs, it should be done by a democratically-elected legislature or the people through a constitutional amendment, not through judicial legislation that would inappropriately preempt democratic deliberation regarding whether or not to authorize same-sex marriage.

Jackson, 884 F.Supp.2d at 1072.

C. Tennessee's Marriage Laws Do Not Violate the Right to Travel.

Plaintiffs' assertion that Tennessee's Marriage Laws violate their constitutionally protected right to interstate travel is likewise without merit. The word "travel" is not found in the text of the Constitution, "[y]et the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). The constitutional right to travel embraces three different components: (1) the right of a citizen of one State to enter and to leave another State; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State; and (3) the right to be treated like a permanent resident, for those travelers who elect to become permanent residents of the second State. *Saenz*, 526 U.S. at 500. Tennessee's Marriage Laws do not violate, or even burden, any of these three components of the right to travel.

The first component of the right to travel, the right to move from state to state, is affected only when a statute directly impairs the exercise of the right to free interstate

movement by imposing some obstacle on travelers. *Saenz*, 526 U.S. at 500-01. *See Edwards v. California*, 314 U.S. 160 (1941) (invalidating law criminalizing bringing indigent persons into California). Plaintiffs are Tennessee residents, not travelers, rendering this first component inapplicable. The second component of the right to travel, the right to be temporarily present in a second state, is also not implicated here for the same reasons.

The third component of the right to travel has been characterized by the Supreme Court as "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State." *Saenz*, 526 U.S. at 502. Plaintiffs' interstate-travel claim appears to be of this variety, as Plaintiffs assert that Tennessee's Marriage Laws infringe upon their right to travel because Tennessee does not recognize their out-of-state marriages. Laws that violate the right to travel under this theory do so because they impose a direct penalty on migration, i.e., they treat newcomers to the State differently from those who already reside there. *Saenz*, 526 U.S. at 503-04 (citing *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1872)).

Tennessee's Marriage Laws make no distinction between or among citizens of Tennessee based upon the length of their citizenship or residency in Tennessee. No resident of Tennessee, no matter the duration of their residency, may have their out-of-state marriage recognized if the marriage is prohibited within the State. Nor may same-sex couples who reside in Tennessee marry. Simply put, Tennessee's Marriage Laws treat all citizens of Tennessee exactly the same, regardless of whether they previously lived in another state, regardless of the length of their residence in Tennessee, and regardless of whether they have married in another jurisdiction. Because Tennessee's Marriage Laws do not treat any citizen differently on the basis of their residence, the length of their residence, their former residence elsewhere, or their

interstate travel (or lack thereof), there can be no violation of the constitutionally protected right to interstate travel. *See Califano v. Torres,* 435 U.S. 1 (1978) (holding that the interstate right to travel guarantees only that new residents of a state be afforded the same benefits of current residents and rejecting the argument that a newcomer must be given benefits superior to current residents of a state if the newcomer enjoyed the superior benefits in another state).

D. Plaintiffs' Complaint is Untimely.

Quite apart from the lack of substantive merit of Plaintiffs' claims, Plaintiffs are also unlikely to succeed on their Complaint for a procedural reason—it was not timely filed. The state statute of limitations governing actions for personal injuries is to be applied to all actions brought pursuant to 42 U.S.C. § 1983 alleging a violation of civil rights. *Foster v. State*, 150 S.W.3d 166, 168 (Tenn. App. 2004); *see also Berndt v. Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986). In Tennessee, the statute of limitations for civil-rights actions or for personal injuries is one (1) year. Tenn. Code Ann. § 28-3-104(a). An action for declaratory relief will be barred to the same extent. *Cope v. Anderson,* 331 U.S. 461, 463-64 (1947); *Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth.*, 108 F.3d 658, 668 (6th Cir.1997). Plaintiffs' Complaint was filed on Monday, October 21, 2013. Therefore, Plaintiffs' constitutional injury and/or deprivation must have occurred on or after October 21, 2012. Based upon the factual allegations of Plaintiffs' Complaint and their declarations in support of injunctive relief, it is apparent that the claims of at least three of the four sets of Plaintiffs are time-barred.

Plaintiffs' out-of-state marriages are void and unenforceable under Tennessee's Marriage Laws. Plaintiffs do not claim to have suffered injury from Tennessee's Marriage Laws until they moved to the State of Tennessee. At least three of the Plaintiff couples moved to the State of Tennessee more than one year before the filing of this lawsuit, barring their legal actions here.

Plaintiffs Tanco and Jesty purchased a home in Knoxville on September 8, 2011; were married in New York one day later, on September 9, 2011; and began their employment with the State of Tennessee six days later, on September 15, 2011. (Doc. No. 32-1, at ¶ 4; Doc. 32-2, at ¶ 4, Ex. D; Affidavit of Connie L. Walden, Exhibits A and B). Plaintiffs DeKoe and Kostura moved to Memphis, Tennessee, in May 2012 after having been legally married in New York. (Doc. No. 1, at ¶¶ 39, 40). Plaintiffs Espejo and Mansell married on August 5, 2008, in California and moved to Franklin, Tennessee, in May 2012. (Doc. No. 32-15, at ¶ 8; Doc. No. 32-16, at ¶ 8; Doc. No. 1, at ¶ 52).[12]

Plaintiffs' Complaint suggests that they will seek to rely upon the "continuing violation" doctrine to survive a time-barred claim, but it will not avail them. The continuing-violation exclusion is strictly construed, *see Austion v. City of Clarksville,* 244 Fed. App'x 639, 647 (6th Cir. 2007), and is rarely applied to § 1983 actions. *See Sharpe v. Cureton,* 319 F.3d 259, 267 (6th Cir. 2003). The Sixth Circuit has consistently held that the ongoing effects of an initial violation do not constitute a continuing violation. *See Eidson v. Tenn. Dep't of Children's Servs.,* 510 F.3d 631, 635 (6th Cir. 2007) ("a continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation"); *see also Broom v. Strickland,* 579 F.3d 553, 555-6 (6th Cir. 2009) (challenge to lethal-injection protocol held time-barred where there existed no continued wrongful conduct, but only the continued risk of future harm).

The only alleged constitutional violation asserted by the Complaint is Tennessee's failure to recognize Plaintiffs' out-of-state marriages. Tennessee's refusal to recognize Plaintiffs' marriages does not recur from time to time on a monthly or annual basis—it happened when they

[12] It is unclear at this juncture whether the claims of Plaintiffs Miller and DeVillez are timely. They allege that they married in New York on July 24, 2011; that they decided to move back to Tennessee in the fall of 2012; and that they purchased a house in Greenbrier, Tennessee, in November 2012. (Doc. No. 32-10 through -14). The Complaint and their individual Declarations are silent regarding the date they actually moved to Tennessee. (Doc. No. 1, at ¶ 46, 47).

moved to the State and subjected themselves to Tennessee's Marriage Laws. Any lingering effects do not toll the statute of limitations. Accordingly, Plaintiffs cannot rely upon the "continuing violations" doctrine to save their Complaint.

II. PLAINTIFFS WILL SUFFER NO IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

The second factor for preliminary injunctive relief requires the Court to determine whether the movants will suffer irreparable harm in the absence of an injunction. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-7 (1959)).

> [The Sixth Circuit] has never held that a preliminary injunction may be granted without any showing that the plaintiff would suffer irreparable injury without such relief. Despite the overall flexibility of the test for preliminary injunctive relief, and the discretion vested in the district court, equity has traditionally required such irreparable harm before an interlocutory injunction may be issued.

Friendship Materials, Inc. v. Mich. Brick, Inc., 679 F.2d 100, 102-3 (6th Cir. 1982) (citations omitted). Plaintiffs must establish that they are suffering or will suffer an irreparable injury in order to obtain injunctive relief.

Plaintiffs contend that they have met their burden of showing irreparable injury because they allege that Tennessee's Marriage Laws violate their constitutional rights. (Doc. No. 30, at 37-38). But, as demonstrated above, Plaintiffs do not enjoy a constitutional right to same-sex marriage or its recognition, and thus this assertion cannot provide the basis for a finding of irreparable injury. So Plaintiffs must otherwise demonstrate that they are being irreparably harmed. To establish irreparable injury, each and every Plaintiff must show that they "will suffer 'actual and imminent' harm rather than harm that is speculative or unsubstantiated." *Abney v.*

Amgen, Inc., 443 F.3d 540, 552 (6th Cir. 2006).[13] Injunctive relief should not issue to address a threat of injury that is conjectural or hypothetical and based upon subjective fears about possible future adverse action. *Moncier v. Jones*, 939 F. Supp.2d 854, 859 (M.D. Tenn. 2013) (citing *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975)). Injunctive relief is not available unless some real possibility of injury is impending or threatened and can only be averted by protective extraordinary process. *Willett v. Wells*, 469 F.Supp. 748, 753 (E.D. Tenn. 1977), *aff'd* 595 F.2d 1227 (6th Cir. 1979).

The Supreme Court has demarcated certain types of injuries that are insufficient to constitute irreparable injury warranting injunctive relief. Monetary damages alone are insufficient. *Sampson*, 415 U.S. at 90 (holding that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). Similarly, reputational damage "falls far short of the type of irreparable injury which is a necessary predicate to issuance of a temporary injunction." *Sampson*, 415 U.S. at 91-92. "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of the litigation, weighs heavily against a claim of irreparable harm." *Id*. at 90 (quoting *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

Generally, Plaintiffs assert that they are denied "state-law protections intended to safeguard married couples and their families." (Doc. No. 30, at 38). But, Plaintiffs concede that they have alternative options, "such as executing powers of attorney, wills, and other probate documents," to secure legal protections. (Doc. No. 32-1, at ¶ 11; Doc. No. 32-2, at ¶ 11; Doc. No. 32-8, at ¶ 11; Doc. No. 32-9, at ¶ 11; Doc. No. 32-10, at ¶ 11; Doc. No. 32-14, at ¶ 11; Doc.

[13] The applicable statute of limitations may pretermit discussion of irreparable harm for those Plaintiffs whose causes of action would be time-barred.

No. 32-15, at ¶ 11; Doc. No. 32-16, at ¶ 11).

Plaintiffs Tanco and Jesty contend they face irreparable harm if their marriage is not recognized before the birth of their child in Spring 2014 because Dr. Jesty will not be presumed to be the child's legal parent and may be prevented from making healthcare decisions. (Doc. No. 30, at 8, 38). This alleged harm, though, is not actual or imminent—it is speculative. Dr. Jesty is not currently being prevented from making any healthcare decisions, and the child is not due to be born until Spring 2014. Furthermore, this matter can be addressed by taking certain legal measures, "such as executing powers of attorney, wills, and other probate documents," as Plaintiffs have admitted they are able to do. While these alternative legal methods may be costly, even inconvenient remedies militate heavily against a finding of irreparability. *See Gilley v. United States*, 649 F.2d 449, 455 (6th Cir. 1981) (district court "clearly correct" to find that personal inconveniences and disruption to family life did not constitute irreparable harm).

Further, the legal parentage statute to which Plaintiffs refer (Doc. No. 30, at 8, 21),[14] which is codified at Tenn. Code Ann. § 68-3-306, would not apply; it requires consent of the mother's *husband*. *See* Tenn. Code Ann. § 68-3-306 ("A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife."). Therefore, Dr. Jesty would not benefit from the presumption established in Tenn. Code Ann. § 68-3-306, regardless of whether her marriage was recognized.

Plaintiffs Tanco and Jesty also allege that they are not receiving family insurance coverage from the University of Tennessee. (Doc. No. 32-1, at ¶¶ 18-19; Doc. No. 32-2, at ¶¶ 18-19). They do not assert that they are being denied coverage, merely that they cannot obtain a

[14] Plaintiffs refer the Court to Tenn. Code Ann. § 36-2-304 on page 8 of their memorandum, but refer to Tenn. Code Ann. § 68-3-306 on page 21. Because Plaintiffs' pregnancy was the result of artificial insemination, Tenn. Code Ann. § 68-3-306 applies.

family plan. This insurance issue is properly characterized as monetary, and is insufficient to constitute irreparable harm.

Plaintiffs DeKoe, Kostura, Espejo, and Mansell can only assert reputational damage. They claim that they are suffering harm to their dignity because of Tennessee's Marriage Laws, which *Sampson* explicitly precludes as grounds for injunctive relief. (Doc. No. 30, at 37-38); *Sampson*, 415 U.S. at 91-92. Furthermore, Plaintiffs have lived in Tennessee under the legal framework of Tennessee's Marriage Laws for more than a year. Clearly, the alleged reputational harm is not "imminent," even if it is unsatisfactory to Plaintiffs.

Plaintiffs Tanco, Jesty, Miller-DeVillez, and DeVillez further assert that harm could occur based upon concerns regarding title to their homes and what could happen should one of them die. (Doc. No. 32-1, at ¶¶ 20-23; Doc. No. 32-2, at ¶¶ 21-24; Doc. No. 32-10, at ¶¶ 15-18; Doc. No. 32-14, at ¶¶ 15-18). But Plaintiffs do not suggest that any one of them is in ill-health, so this is not an immediate issue requiring extraordinary relief. Furthermore, Plaintiffs' quitclaim deeds have been accepted and recorded by the Register of Deeds. (Doc. No. 32-1, at ¶¶ 22-23; Doc. No. 32-2, at ¶¶ 23-24; Doc. No. 32-7; Doc. No. 32-10, at ¶¶ 17-18; Doc. No. 32-14, at ¶¶ 17-18). Whether an occasion will arise to question the deeds' efficacy is speculative at best, and certainly does not constitute imminent harm.

III. THE PUBLIC INTEREST AND POTENTIAL HARM TO THE STATE WEIGH IN FAVOR OF DENYING A PRELIMINARY INJUNCTION.

The final two factors for consideration are whether the balance of harm to the parties and the public interest support injunctive relief. Because the public interest greatly disfavors obstructing a State from enforcing its public policy determinations, a preliminary injunction is disfavored.

Generally the public interest favors federal courts denying extraordinary injunctive relief that may affect state domestic policy or the good faith functioning of state officials. *See generally Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 351 (1951) (finding "[i]t is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.")

> Caution and reluctance there must be in special measure where relief, if granted, is an interference by the process of injunction with the activities of state officers discharging in good faith their supposed official duties. In such circumstances this court has said that an injunction ought not to issue "unless in a case reasonably free from doubt." *Mass. State Grange v. Benton*, 272 U.S. 525, 527 (1926).

Hawks v. Hamill, 288 U.S. 52, 60 (1933). As members of the Supreme Court have recently noted, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable harm." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. __, 2013 WL 6080269, slip op. at 1 (Nov. 19, 2013) (Scalia, J., concurring in denial of application to vacate stay of an injunction) (quoting *Maryland v. King*, 567 U.S. 1, 3 (2012) (Roberts, C.J., in chambers)).

Plaintiffs seek to override by judicial fiat the results of Tennessee's valid democratic process establishing the public policy of this State. In doing so, they have requested a preliminary injunction affording them special treatment not given to other Tennesseans. Rather than maintaining the status quo, as is the general purpose of injunctive relief, Plaintiffs seek special treatment by requiring that the State recognize their out-of-state marriages pending disposition of this litigation.

But granting a preliminary injunction would cause harm to Tennessee in the form of an affront to its sovereignty. The State's public policy, as expressed by a strong majority of its citizens, is represented by Tennessee's Marriage Laws, and marriage is an area of the law that

lies within the exclusive province of the separate States. If the Court were to issue a preliminary injunction, it would create the impression that Tennessee's public policy is subservient to that of other States. If New York or California can craft laws that Tennessee must oblige, despite Tennessee's valid public policy determinations to the contrary, Tennessee's ability to carry out the will of its democratic process would be forever diminished.

Finally, issuance of a preliminary injunction represents a line in the sand. Such recognition, once granted to these Plaintiffs, would be difficult to undo should Defendants prevail on the merits, and the Defendants have shown that they will do just that. It would be wrong to temporarily grant Plaintiffs Tanco and Jesty the ability to make medical decisions on behalf of one another, or permit them to obtain a family insurance plan, only to withdraw that power upon final disposition of the case.

CONCLUSION

For the reasons stated, the motion for preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

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